In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1282

SAMUEL RATNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the court of appeals erred by failing independently to determine whether the materials at issue here were obscene, (2) that in fact they were not obscene in light of materials found not to be obscene in other cases, and (3) that the government is required to introduce expert testimony on the issue of obscenity.

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on seven counts charging the mailing of obscene magazines and films, and the mailing of advertisements detailing how to obtain those magazines and films, in violation of 18 U.S.C. 1461.[1] He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A6; 502 F. 2d 1300).

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[1]Also convicted at the joint trial were co-defendants Albert Ratner and Wyngate and Bevins, Inc.

The evidence showed that petitioner was president of Wyngate and Bevins, Inc., a mail order house dealing in pictures, books, magazines, and films (Tr. 309, 721). Petitioner and Albert Ratner, his brother, supervised and directed the operations of the firm, which also conducted business under the name S and D Products (Tr. 308-309, 717). The company mailed thousands of advertisements, both solicited and unsolicited, throughout the United States (Tr. 247, 323-324, 334, 344, 384, 411). One of the unsolicited advertisements was addressed to a 16-year-old girl (Tr. 406-409).

Among many other items, the company advertised magazines entitled "Ups and Downs," "In Scene," and "Epic 300," and films entitled "Obscene House, Reel 1 and Reel 2." One advertisement announced "The shameless line for '69, wanton wives and permissive mates" (Tr. 944); another described one magazine as "the erotic thunder on the hard line horizon" (Tr. 937). One of the films was advertised as "Four naked female bodies writhing together in one bed" engaged in mutual oral gratification (Tr. 945-946).

The magazines that petitioner mailed were composed mainly of photographs of from one to six nude or partially nude men and/or women talking, drinking, dancing, disrobing, embracing, caressing and masturbating. The meager text dealt with homosexual and extramarital group sexual activity.

Petitioner's trial occurred prior to this Court's decision in *Miller* v. *California*, 413 U.S. 15. Thus, the *Roth-Memoirs* standard then in effect was applied.[2] *Miller* was decided while the case was pending on appeal, and the

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[2] *Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

court of appeals reviewed the conviction in light of that decision, as well as *Hamling* v. *United States*, 418 U.S. 87.

1. Petitioner claims (Pet. 11-14) that the court of appeals failed to make an independent determination that the materials at issue here were obscene. But this Court has never required such an independent determination by an appellate court.[3] It has held only that juries do not have "unbridled discretion" in determining what is "patently offensive" (*Jenkins* v. *Georgia*, 418 U.S. 153, 160) and that appellate courts have "the ultimate power * * * to conduct an independent review of constitutional claims when necessary." *Miller* v. *California*, *supra*, 413 U.S. at 25.

The general rule in obscenity cases, as in other criminal cases, is that an appellate court will not make an independent determination of guilt or innocence but will sustain the jury's verdict of guilt if, viewing the evidence in a light most favorable to the government, there is substantial evidence to support it. See *Hamling* v. *United States*, *supra*, 418 U.S. at 100, 124. The court of appeals did just that in the instant case, for its opinion expressly states (Pet. App. A5):

> We have examined the record and exhibits and find that the jury could reasonably find, as it did, that the materials were obscene under the *Memoirs* standard.
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> * * *We find no basis for believing that the defendants would have fared better had they been tried under [the *Miller*] standard of obscenity. See *Hamling* v.

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[3]Only three members of the Court have expressed the view that such an independent appellate determination must be made. See *Jenkins* v. *Georgia*, 418 U.S. 153, 163-165 (Brennan, J., concurring).

> *United States*, 1974, [418] U.S. [87], 94 S. Ct. 2887, 41 L. Ed. 2d 590, 611.[4]

Finally the court stated in a footnote (Pet. App. A5-A6, n. 3):

> We conclude, as the Supreme Court concluded in *Hamling*, that consideration of the record and the charge as a whole shows that there is no substantial probability that elimination of the references to a "national community" would have materially affected the jury's deliberations. [See *Hamling* v. *United States, supra*, 418 U.S. at 108.]

Thus, the court of appeals in this case determined that the evidence was sufficient to support the jury's verdict under both the *Roth-Memoirs* standard and that portion of the *Miller* standard which could benefit petitioner. No more was required.

2. Petitioner next contends (Pet. 14-15) that the materials here are not obscene because similar materials have been held to be non-obscene in other cases.[5] None of the cases cited, however, involved the pandering issue presented here. Petitioner mailed thousands of advertisements proclaiming the prurience of the materials, and the jury was

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[4]The court's reference to *Hamling* was to that portion of the opinion in which this Court required that any constitutional principle enunciated in *Miller* which would benefit a defendant whose case was on direct review must be applied. *Hamling* v. *United States, supra*, 418 U.S. at 102.

[5]The cases referred to are listed in the brief filed by petitioner in the court of appeals (pp. 21-25). In almost all of the cases cited, convictions were summarily reversed on the authority of *Redrup* v. *New York*, 386 U.S. 767. See, *e.g.*, *Keney* v. *New York*, 388 U.S. 440; *Friedman* v. *New York*, 388 U.S. 441; *Bloss* v. *Dykema*, 398 U.S. 278; *Burgin* v. *South Carolina*, 404 U.S. 806.

properly instructed that evidence of pandering could be considered on the issue of obscenity (Tr. 1045). Petitioner's reliance on cases which do not allude to that factor is misplaced. For, as this Court has stated: "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." *Ginzburg* v. *United States,* 383 U.S. 463, 470. See also *Hamling* v. *United States, supra,* 418 U.S. at 130.

3. Finally, petitioner claims (Pet. 15-20) that in order to prove obscenity the government must present expert testimony.[6] However, this contention is foreclosed by *Hamling* v. *United States, supra,* 418 U.S. at 100, *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 56, *Kaplan* v. *California,* 413 U.S. 115, 121-122, and *Ginzburg* v. *United States, supra,* 383 U.S. at 465, which held that expert testimony is not necessary to enable the jury to judge the obscenity of material that has been placed in evidence.

In a related contention, petitioner argues (Pet. 18-20) that his conviction must be reversed because the government failed to submit evidence that the materials here appealed to prurient interest, were patently offensive and were utterly without redeeming social value, and that the materials themselves were insufficient to prove these elements. As this Court has said, however: "The [materials], obviously, are the best evidence of what they represent. 'In the cases in which this Court has decided obscenity questions since *Roth,* it has regarded the materials as sufficient in themselves for the determination of the question.'" *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 56

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[6]No expert was offered by the government in the instant case. Instead, the obscene materials themselves were introduced in evidence. See Tr. 226, 377, 409-410, 507, 511, 514, 519.

(footnote omitted), quoting *Ginzburg* v. *United States*, *supra*, 383 U.S. at 465.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.